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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 25673-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

PHILLIP J. BOBENHOUSE,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

Phillip J. Bobenhouse replies to the State's brief due to a number of concerns.

I. ACCOMPLICE LIABILITY

The State misconstrues Mr. Bobenhouse's argument concerning accomplice liability. A person cannot be convicted as an accomplice unless there is an appropriate charging document and appropriate instructions.

Instructions 13, 14 and 17 improperly added an element/language to the respective offenses of first degree child rape and first degree incest. This element/language was not included in the Amended Information.

First, and foremost, a crime must have been committed for a person to be convicted as an accomplice. The statutory language of RCW 9A.08.020 is specific. It requires the "commission of a crime."

The crime of first degree child rape was not committed. The age differential between the children was insufficient to satisfy the requisite element of that offense.

The State concedes Mr. Bobenhouse's argument by citing *State v. McDonald*, 138 Wn.2d 680, 981 P.2d 443 (1999):

... The legislature has said that anyone who participates in **the commission of the crime** is guilty of **the crime** The elements of **the crime** remain the same.

(Emphasis supplied.)

The State in an attempt to validate its actions dehumanizes the children. The State compares the children to "instruments."

Chapter 9A.04 RCW does not define the word "instrument."

BLACK'S LAW DICTIONARY (8th ed.) defines a "criminal instrument" as:

1. Something made or adapted for criminal use. Model Penal Code § 5.06(1)(a).
2. Something commonly used for criminal purposes and possessed under circumstances showing an unlawful purpose. Model Penal Code § 5.06(1)(b).

Under no possible interpretation of "criminal instrument" can a child be considered an "instrument."

The State is required to prove that a crime was committed. Accomplice liability may attach once the State has established the underlying crime.

Under the facts and circumstances of Mr. Bobenhouse's case no crime of first degree child rape occurred. There was a crime of first degree incest. Accomplice liability could attach to that offense if the instruc-

tions given to the jury are appropriate instructions on accomplice liability as it is defined in RCW 9A.08.020(2)(a).

The State's brief is flawed. It reverses Mr. Bobenhouse's argument and states that "the accomplice must be found to have committed a crime in order for the principal to be accountable." (Respondent's Brief, p. 8)

Further, the State completely ignores the case of *State v. Peterson*, 54 Wn. App. 75, 78, 772 P.2d 513 (1989) which states:

Accomplice liability ... is predicated on aid to another "**in the commission of a crime** and is in essence liability for **that crime.**" [Citations omitted.] **Conviction for accomplice liability is improper where there is no proof that a principal "actually committed the crime."** [Citations omitted.]

(Emphasis supplied.)

The State implies that Mr. Bobenhouse is required to challenge the jury's findings of fact. The law does not require such an act. Any challenge to the jury verdict is a challenge to its findings of fact. The State's reliance upon *State v. Neeley*, 113 Wn. App. 100, 52 P.3d 539 (2002) is totally misplaced.

The *Neeley* case involved a suppression hearing. A trial court is required to enter findings of fact and conclusions of law following a suppression hearing.

A jury is not required to enter findings of fact and conclusions of law.

The State's reliance upon the United States Code should carry no weight. The language of the Code substantially differs from the language of RCW 9A.08.020(2)(a).

The State also tries to justify its actions in convicting Mr. Bobenhouse of a non-existent crime by reference to LAWS OF 1994, Ch. 271, Sec. 301 which states:

The legislature hereby reaffirms its desire to protect the children of Washington from sexual abuse and further reaffirms its condemnation of child sexual abuse that takes the form of causing one child to engage in sexual contact with another for the sexual gratification of the one causing such activities to take place.

(Emphasis supplied.)

The State does not correctly analyze Legislature's purpose. It picks and chooses its words. It misleads the Court by arguing that the purpose clause pertains to all "child sexual abuse."

The language of the purpose clause is in the conjunctive. This means that the two (2) clauses must be read together. *See: Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

The Legislature's enactment of Chapter 271 was in response to *State v. B.J.S.*, 72 Wn. App. 368, 864 P.2d 432 (1994).

The Legislature limited itself to addressing child molestation. The caption of this particular section of Chapter 271 is – PART III – CHILD MOLESTATION.

The State's attempt to argue that the Legislature also intended to amend the child rape statutes is without citation to authority. The State has no basis other than its forlorn wish that the Legislature had enacted such an amendment.

The State also relies upon *State v. Parmelee*, 108 Wn. App. 702, 32 P.3d 1029 (2001).

The *Parmelee* case dealt with issues of merger and double jeopardy. There is absolutely no discussion of accomplice liability contained in the case.

The State again tries to create something from nothing.

When looking at the State's brief it becomes apparent that the prosecuting attorney was overreaching in his charging decision and continues to do so. The State candidly admits it wanted to pursue a "level XII offense as opposed to a level X offense." (Respondent's Brief, p. 14).

It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and *such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness towards the accused, is the highest commendation they can hope*

for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.

State v. Montgomery, 56 Wash. 443, 447-48, 105 P. 1035 (1909) as quoted in *State v. Torres*, 16 Wn. App. 254, 264-65, 554 P.2d 1069 (1976).

Mr. Bobenhouse asserts that the totality of the circumstances in his case fully support his argument of prosecutorial overreaching.

II. UNANIMITY

The State misleadingly sets forth the testimony of John Doe. The State's argument indicates that oral sex and finger insertion occurred at the same time. This is clearly not how John Doe testified.

The testimony was:

Q. What did he make you suck?

A. The penis.

Q. What did you have to suck with?

A. My mouth.

Q. How many times did you have to do this
with your dad?

A. Every week.

(RP 158, ll. 8-13)

Q. Did your dad ever, ah, do anything with
you, other -- with his penis, other than
just make you suck on it?

A. Yes.

Q. What did he do?

A. He put his finger in my butt.

(RP 160, ll. 14-18)

When this testimony is viewed in the context of the time frame being discussed in John Doe's testimony, it becomes apparent that separate and distinct acts occurred.

A unanimity instruction was clearly required under the facts and circumstances of the case. *See: State v. Hepton*, 113 Wn. App. 673, 684-85, 54 P.3d 233 (2002); *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996); *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984).

The State is fully aware that a unanimity instruction was required. The State's argument in its brief that Mr. Bobenhouse had some burden of proof with regard to the offenses charged is a further example of its disregard for his constitutional rights. No criminal defendant has any burden of proof with regard to any element of any crime that may be charged, except insofar as an affirmative defense may be applicable.

Thus, when the State argues that

Appellant made no effort to distinguish between either of the alternative suggested means of sexual intercourse, or to offer any

competing factual scenario that might have made the existence of one of the alternatives more or less likely than the other.

(Respondent's Brief, p. 24)

Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

RCW 9A.04.100(1).

A criminal defendant cannot be compelled to be a witness against himself. *See*: United States Constitution, Fifth Amendment; Const. art. I, § 9.

III. CHARGING PERIOD

The State claims that Mr. Bobenhouse distorts John Doe's testimony. He does not do so. Rather, it is the State that distorts the testimony.

When John Doe is discussing the time frame involved with regard to the incident of oral sex, he is not discussing **any** time frame pertaining to anal sex.

A careful review of John Doe's testimony starting at RP 158, l. 1 to RP 170, l. 2 clearly indicates that only the act of oral sex was given a definitive time frame. The anal sex appears to have occurred only one (1) time; and no one knows when.

IV. TIME-FOR-TRIAL

The State continues to assert that the ninety (90) day clock applies to Mr. Bobenhouse's time-for-trial under CrR 3.3.

The State concedes that it did not bring Mr. Bobenhouse to trial within the sixty (60) day clock. The State asserts: "a total of 72 days elapsed ... between the date of arraignment (November 28, 2005) and February 21, 2006"

Thus, if no excluded period applies, and the ninety (90) day clock is inapplicable, the State failed to bring Mr. Bobenhouse to trial within the parameters of CrR 3.3.

Mr. Bobenhouse relies upon the argument contained in his original brief to support the fact that the sixty (60) day clock applies.

The State asserts that Mr. Bobenhouse cannot raise this issue on appeal, and that his arguments are moot.

The State may be correct if the ninety (90) day clock applies. However, if the sixty (60) day clock applies, then the State is incorrect.

Mr. Bobenhouse was arraigned on November 28, 2005. No bond was set since he was under sentence on another case. (RP 6, ll. 12-17)

Nevertheless, Mr. Bobenhouse was held to answer to the Information charging him with the various counts of first degree child rape and first degree incest.

CrR 3.3(c)(1) is not ambiguous. The commencement date for time-for-trial is the date of arraignment.

The State does not dispute that the Court failed to comply with CrR 3.3(d)(1). April 11, 2006 was the first trial date assigned. This particular date was not set until January 31, 2006. (CP 84; 01/25/06 RP 10, ll. 1-6)

The State seems to imply the existence of an excluded period under CrR 3.3(e)(2). However, a careful reading of that rule indicates it only applies to “pre-trial proceedings, trial and sentencing” as to unrelated charges. Mr. Bobenhouse had already been sentenced and was incarcerated when arraigned in this case.

Mr. Bobenhouse continues to rely upon his argument concerning ineffective assistance of counsel as contained in his original brief.

V. EXCEPTIONAL SENTENCE

The State does not address Mr. Bobenhouse’s argument that it failed to comply with RCW 9.94A.537(2). Rather, it argues that an aggravated sentence may be imposed under RCW 9.94A.712 without complying with the former statute. The State incorporates a “free crimes” argument into its brief as further support for the position it takes.

... [I]n *Hughes* [*State v. Hughes*, 154 Wn.2d 118, 138-40, 110 P.3d 192 (2005)], we rejected the argument that the “free crimes” factor fits within the “prior convictions” exception to the *Blakely* [*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004)] rule.

State v. Ose, 156 Wn.2d 140, 149, 124 P.3d 635 (2005).

The *Ose* case supersedes *State v. Brundage*, 126 Wn. App. 55, 107 P.3d 742 (2005) upon which the State relies.

Both the *Blakely* decision and current statutory authority require that aggravating circumstances, and in particular, the aggravating circumstances relied upon the State in this case, be submitted to a jury for determination.

VI. SAME CRIMINAL CONDUCT

The State relies upon *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995) to support its argument that first degree child rape and first degree incest do not constitute the “same criminal conduct.”

The *Calle* decision indicates that incest and child rape can be punished separately. It does not indicate that a “same criminal conduct” analysis does not apply. In fact, the State again misleads the Court.

Calle does not stand for the proposition that the victim in an incest case is society as opposed to the individual. Rather, it enumerates various reasons for recognizing the crimes as separate offenses:

INCEST - ... to promote and protect family harmony, **to protect children from the abuse of parental authority**, and “because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict.” *State v. Kaiser*, 34 Wn. App. 559, 566, 663 P.2d 839, *review denied*, 100 Wn.2d 1004 (1983).

RAPE - ... rape is a crime with diverse implications, it is most often a crime of aggression, power, and violence. The focus of the

crime is not simply sexual violation, but also the fear, degradation and physical injury accompanying that act.

State v. Calle, *supra*, 781. (Emphasis supplied.)

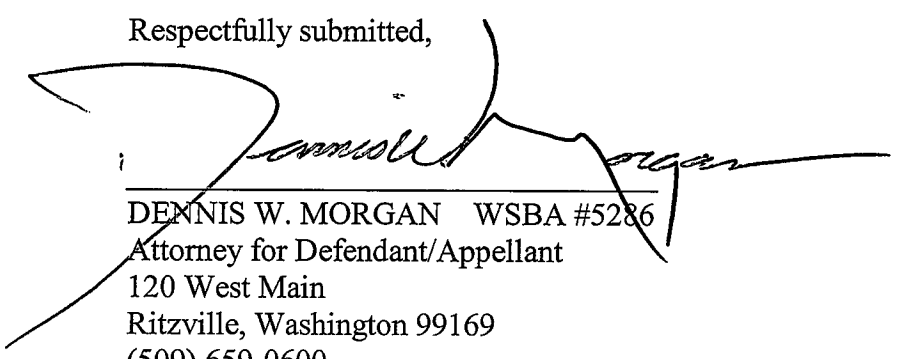
Mr. Bobenhouse contends that neither crime can be committed unless a person is the "victim." There may be an impact upon society, as a whole, when either offense is committed. Nevertheless, this does not mean that the two (2) offenses cannot be considered "the same criminal conduct."

In fact, *Calle* noted at 772: "The trial court determined that the current offenses encompassed the same criminal conduct." The *Calle* Court did not disavow this finding and apparently the State did not appeal it.

Mr. Bobenhouse reiterates each and every argument previously set forth in his original brief and requests that the relief be granted as set forth in that brief.

DATED this 19th day of September, 2007.

Respectfully submitted,



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